

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

ORIGINAL

76-4062

B
P/S

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

POIRIER & McLANE CORPORATION,

Appellee,

v.

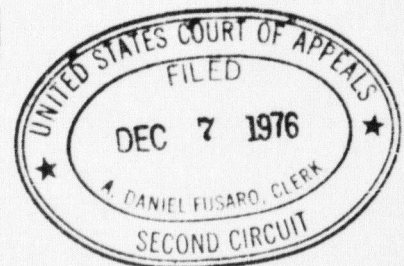
COMMISSIONER OF INTERNAL REVENUE,

Appellant.

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

**APPELLEE'S PETITION FOR REHEARING
IN BANC**

ST. JOHN & DOUGHERTY
The Colonial Office Building
14 Vanderventer Avenue
Port Washington, N. Y. 11050
(516) 883-1141



IN THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

-----X
POIRIER & McLANE CORPORATION, :

Appellee, :

-against- :

COMMISSIONER OF INTERNAL REVENUE, :

Appellant. :

PETITION FOR
REHEARING
IN BANC

NO. 76-4062

-----X
Edward S. St. John, a member of the law firm of
St. John & Dougherty, with offices at The Colonial Office
Building, 14 Vanderventer Avenue, Port Washington, New York
11050, the attorneys for the appellee herein, respectfully
petitions this court for a rehearing in banc of the appeal of
the Commissioner of Internal Revenue from the decision of the
United States Tax Court allowing a deduction of \$1,100,000.00
from appellee's taxable income for the year 1964.

In 1964 the Internal Revenue Code was amended by
the addition thereto of a new Section 461 (f) and the Treasury
promulgated regulation Section 1.461-2 (c). The instant case
is one of first impression with respect to the application of
this statute and this regulation.

The Tax Court was divided six to four in favor of
the taxpayer. This court, divided two to one, reversed. Of

the thirteen judges who participated in the decision below and the decision on appeal, seven held that the deduction was proper and six held it improper.

In view of this almost equal division among the judges who have participated in this case of first impression appellee respectfully requests a rehearing in banc.

Section 461 (f) created a new deduction. It did more than determine the timing of a deduction. It enabled the accrual taxpayer to treat the payment of contested liabilities, in appropriate circumstances, as two separate events. A deduction is authorized when payment is made or when property is transferred beyond the taxpayer's control for the purpose of making such payment and any subsequent refund or return to the taxpayer is treated as income in the year it is returned. Southwestern Illinois Coal Corp. v. United States, 491 Fed.2d 1337.

Section 461 (f) of the Internal Revenue Code provides that if 1) the taxpayer contests an asserted liability, 2) the taxpayer transfers money or other property to provide for the satisfaction of the asserted liability, 3) the contest with respect to the asserted liability exist after the time of transfer, and 4) but for the fact that the asserted liability is contested a deduction would be allowed for the taxable year of the transfer, (or for an earlier taxable year), the deduction shall be allowed for the taxable year of transfer.

The Treasury Regulation Section 1.461-2 (c) provides that the taxpayer may provide for the satisfaction of the asserted

liability by transferring property beyond control to a trustee pursuant to a written agreement among the trustee, the taxpayer and the person who is asserting the liability.

In 1964, the year of the enactment of Section 461 (f), litigation was pending against the taxpayer in which the claimed damages exceeded \$14,700,000.00. These claims were based upon the alleged negligence of the alleged trespass by the taxpayer. Taxpayer was insured to the extent of \$500,000.00 against claims based upon negligence. In December 1964 appellee entered into a deed of trust signed by it and Manufacturers Hanover Trust Company, a professional trustee, (but not by the claimants) and pursuant thereto delivered to the trustee a certificate of deposit and seven United States Treasury Bills in the total face amount of \$1,200,000.00 for the satisfaction of the contested claims pending against it enumerated in the deed of trust (Appendix p. 30). The United States Tax Court was unanimous in one thing, i.e. that a valid trust had been created (Appendix pp. 59-66) and this Court was unanimous in that the funds were transferred beyond the taxpayer's control (Opinion p. 607).

The majority of this court, in a foot note to its opinion at page 608, noted that whether the settlor or creditors are beneficiaries of a trust established for the payment of creditors is a question of intent. It referred

with approval to a case cited by the appellant, EHAG EISEN Holding AG v. Banca Nat. a ROMANIEI, 306 N.Y. 242 (1954).

We respectfully submit that the cited case has no application. There the court held at page 249, "the various bond documents and the agreement between the bank and the government clearly established that no duty was imposed upon, or assumed by, the bank to make any payments whatsoever to the bond holders" and at page 250 "it is settled that a deposit of monies in a bank by a corporate or governmental debtor with instructions to pay manufacturing bond in Treasury Coupons of the depositor, does not ordinarily create a trust for the benefit of the bond holders or give rise to a cause of action against the bank. It merely creates a debtor-creditor relationship between bank and depositor, coupled with an agency on the part of the bank to make the prescribed payments."

Here, unlike the cited case, there was no deposit by the taxpayer. There was no debtor-creditor relationship between the taxpayer and the Manufacturers Hanover Trust Company. The relationship was that of settlor and trustee as is evidenced by the trust agreement (Appendix p. 30) where the words of art accurately describe the relationship between the two. That language is as follows "The Settlor hereby assigns and delivers to the Trustee the property described in Schedule A attached hereto and made a part of this agreement, the receipt of which is acknowledged in trust, to hold, manage

control, invest and reinvest ***." (Underscoring supplied)

This agreement irrevocably fixed the rights of the claimants to have the property which constituted the corpus of the trust delivered in accordance with the settlement of the various contests with the same force and effect as if it had been signed by the claimants.

It appears from the various opinions written in this case both in the United States Tax Court and in the United States Court of Appeals that the taxpayer did everything which the statute required it to do. It 1) contests the asserted liabilities, 2) transferred money or other property beyond its control to provide for the satisfaction of the asserted liabilities, 3) the contest with respect to the asserted liability existed after the time of the transfer, and 4) but for the facts that the asserted liability was contested the deduction would have been allowed for the taxable year of the transfer. A majority of all of the judges who heard the case held that the regulation was complied with if it meant that the rights of the claimants were defined and protected by the trust agreement. Six held that if the regulation required the claimants to be signatory to it the regulation was to that extent invalid.

Where the taxpayer complied in all respect with the statute, as this taxpayer did, but did not do everything the regulation required it to do, then the regulation must

require something the statute does not require, and, to that extent, the regulation constituted an addition to the statute and is legislation not regulation. Therefore to that extent it is invalid.

For the convenience of the Court we have printed as an Appendix to this petition those portions of the United States Code, Congressional and Administrative News which contain any reference to Section 461 (f) either in the Senate Supplemental Report, Conference Report, Senate Debate and House Debate. Petitioner respectfully refers the Court to pages 1A through 9A.

WHEREFORE petitioner respectfully requests that this Court grant a rehearing in banc of this appeal.

Respectfully submitted,

By



Edward S. St. John

ST. JOHN & DOUGHERTY

Attorneys for Petitioner

14 Vanderventer Avenue

Port Washington, New York 11050

516-883-1141

United States Court of Appeals
~~for the Second Circuit~~

Poirier & McLane Corporation,

Appellee,

v.

Commissioner of Internal Revenue,

Appellant.

**AFFIDAVIT
OF SERVICE
BY MAIL**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Charles Esposito, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 77 Broadway, Malverne, new York
That on December 7, 1976, he served 3 copies of
on Appendix and Petition for Rehearing

Scott P. Crampton,
Assistant Attorney General

Gilbert E. Andrews,
Robert A. Bernstein,
John G. Manning,
Attorneys
Tax Division
Department of Justice
Washington, D.c., 20530

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Sworn to before me this

7 day of December, 1976

..... Charles Esposito

John C. Sengul
Notary Public, State of New York
No. 11111111
Qual. 11/11/75, New York County
Commission Expires March 10, 1977